DRAFTER'S NOTE
FROM THE
LEGISLATIVE REFERENCE BUREAU

LRB–0316/1dn
RNK:jld:jf

October 25, 2002

This is a redraft of 2001 Assembly Bill 416. It also incorporates LRBa1278/1. I have made some minor nonsubstantive changes in the draft for the purposes of clarity only.

As Mark Kunkel, who prepared last session's version of this draft, indicated in a drafter's note to you, this draft could be subject to a constitutional challenge on the basis that it violates the Commerce Clause of the U.S. Constitution. The Commerce Clause limits the authority of the states to enact legislation affecting interstate commerce.

Generally, the U.S. Supreme Court has identified two areas of inquiry in examining whether a statute violates the Commerce Clause. The court first asks if the statute discriminates against interstate commerce. If the court concludes that the statute does not discriminate against interstate commerce, the court then asks whether the statute imposes a burden on interstate commerce that is clearly excessive in relation to the local state interest. In other words, under the second inquiry, the court applies a balancing test.

There are two recent cases that have examined the question of whether a state law regulating unsolicited e–mail (spam) violates the commerce clause. In *State of Washington v. Heckel*, 24 P. 3d 404 (2001), and *Ferguson v. Friendfinders*, 94 Cal. App 4th 1255 (2002), the Washington Supreme Court and the California appeals court concluded, respectively, that the Washington and California statutes regulating the sending of spam do not violate the Commerce Clause. Both states have laws that are similar to the proposal contained in this draft. There are certain differences, however, that are worth noting.

Under the Washington law, the regulation of spam only applies to a person that sends e–mail from a computer in Washington to a Washington resident. The California law specifies that the requirements of the law only apply when spam is "delivered to a California resident via an electronic mail service provider's service or equipment located" in California. These laws are distinguishable from the proposal contained in this draft because this draft applies to any person who sends spam to a Wisconsin resident. This distinction may be sufficient to cause a Wisconsin court to conclude that this proposal improperly imposes a burden on interstate commerce.

Because a Wisconsin court is not bound by any decision of the court of another state, and because it is difficult to predict how a Wisconsin court would rule if this proposal

was challenged on constitutional grounds, you might want to consider drafting this proposal more narrowly to avoid such a challenge. If you would like to discuss this issue in more detail, please feel free to contact me.

Robin N. Kite
Legislative Attorney
Phone: (608) 266–7291
E–mail: robin.kite@legis.state.wi.us